ABRAHAM EPSTEIN

IBLA 76-139 Decided March 19, 1976

Appeal from decision of the Nevada State Office, Bureau of Land Management, denying a request to purchase land under the Small Tract Act at the original appraised value.

Reversed and remanded.

1. Public Lands: Appraisals -- Public Sales: Generally -- Small Tract Act: Generally

   Department of the Interior policy requires that, in most circumstances, full value be received by the Government in any sale of public land.

2. Small Tract Act: Generally

   The mere filing of a small tract purchase application does not create in the applicant any right or interest in the land.

3. Appraisals -- Public Lands: Appraisals -- Small Tract Act: Generally

   A notification to a small tract lessee, which was authorized by a memorandum of the Director, Bureau of Land Management, dated October 19, 1955, and approved by the Secretary of the Interior on November 9, 1955, that the lessee could purchase the tract under lease without constructing the improvements required in the option to purchase clause of the lease, if he paid the appraised price shown on the lease within a set time, was an offer to sell the tract by the United States, and exercise of the option by the

lessee created a binding contract. Where issuance of the patent was delayed for years because of the contest of a conflicting mining claim, reappraisal to determine changed value since that time is not permissible because there was a binding contract under special authority.

APPEARANCES: Robert J. Cohen, Esq., Clark County Legal Service Program, Las Vegas, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

This appeal by Abraham Epstein pertains to the purchase of land which had been leased to him under small tract lease N-013433. By decision dated August 1, 1975, the Nevada State Office, Bureau of Land Management (BLM), informed Mr. Epstein that he could no longer purchase the land for the original appraised value set forth in his lease, but only at the current fair market value. Mr. Epstein has appealed from the BLM decision.

Appellant was issued a 3-year lease for 2 1/2 acres of land in section 29, T. 22 S., R. 61 E., M.D.M., Nevada, effective October 13, 1953, pursuant to the Small Tract Act of June 1, 1938, as amended, 43 U.S.C. § 682a et seq. (1970). The land was classified for lease and sale. The lease included a standard "Option to Purchase" provision with a purchase price of $175, the value of the land as set forth in the lease.

In January 1956, BLM notified appellant that the Secretary of the Interior had authorized acceptance of applications to purchase land held under small tract leases in the Las Vegas, Nevada, area without requiring the lessees to comply with the improvement provisions of their leases. Accordingly, appellant filed a purchase application on April 16, 1956, with the $175 purchase price plus a $10 filing fee.

On November 16, 1956, BLM informed appellant that the land he applied for was in conflict with a mining claim. BLM then stated that appellant's purchase application would be suspended until resolution of the mining claim contest and that he need take no further action. Appellant was also given the option of requesting a refund of his purchase money or leaving it with BLM. Appellant did not request a refund.

The conflicting mining claim was declared null and void by BLM in 1970. That decision was upheld by this Board in United States v. Stewart, 5 IBLA 39 (1972).

Acting upon the advice of the Field Solicitor, BLM sent appellant a form in May 1975 asking whether he desired to purchase the land at the "current market value" or desired to withdraw his application and receive a refund. Appellant responded that he desired to purchase the land for the original value of $175.

BLM then issued its decision. In that decision, the Nevada State Office stated that the filing of a small tract purchase application in response to a notice of sale "cannot result in a completed contract or vest any right to purchase at a designated price," in the absence of acceptance by the Government. The State Office further informed appellant that the Department's land conservation policy forbids land transactions where the Government will not receive full value for the land. In support of its position, the State Office cited Kenneth W. Swallow, A-28975 (August 6, 1962), and Joseph J. Miller, A-30681 (May 3, 1967).

In his appeal, appellant points out that 43 CFR 2913.3(a) states that under an option to purchase clause, the purchase price shall be the appraised value of the land "as of the date of the lease." He distinguishes the cases cited by BLM as not involving applicants who exercised option clauses under valid leases. He concludes that the Government is estopped from reappraising the land. Although we do not agree with appellant's conclusion that estoppel exists, we find that a binding contract existed and that appellant may be entitled to purchase the land at the original appraised value.

[1] The policy of the Department of the Interior with regard to land disposals, as set forth in the Departmental Manual, is:

> The Government must receive a full return for its property in terms of money or other values. No party to a transaction with the Government should receive a windfall. To the extent that the law permits and in the absence of a binding contract, (a) no transaction will be entered into by the Bureau of Land Management where it is not clearly shown by competent evidence that the Government will receive full value and (b) no transaction will be consummated where, in the course of processing, evidence develops that the Government will not receive full value. [Emphasis added.]

602 DM 3.1. Similarly, 43 CFR 1725.2-1(a) requires disposal at not less than fair market values "[w]herever the law does not provide otherwise."

[2] The Nevada State Office correctly cited Kenneth W. Swallow, supra, and Joseph J. Miller, supra, for the principle that the filing of a small tract purchase application in response to a BLM notice of sale does not give the applicant any right or interest in the land. Until BLM accepts the application, no contract rights arise and the land may be reappraised to insure that the Government receives full value as prescribed by 602 DM 3.1. Cf. Willcoxson v. United States, 313 F.2d 884, 888 (D.C. Cir.), cert. denied, 373 U.S. 932 (1963). 1/ Moreover, the Board has held that administrative delay in the processing of such an application has no effect on the Government's right to receive full value for its land. George D. Jackson, 20 IBLA 253, 256 (1975); Glenn T. Norton, 16 IBLA 105 (1974); Eugene G. Roguszka, 15 IBLA 1, 6-9 (1974).

[3] However, there is a vital difference between the facts in the above cases and the facts before us now. None of those cases involved an applicant who had exercised, as appellant here did, an option to purchase contained in a lease as modified by the change in the option terms pursuant to Secretarial instruction. The effect of this exercise is to create a binding contract between appellant and the Government.

The option to purchase clause in appellant's lease states:

> If the land is classified for lease and sale lessee may purchase it after the expiration of 1 year from the date of this lease, provided he has made the improvements herein required, and fully complied with the terms and conditions of this lease, for the amount indicated in

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1/ United States v. Willcoxson, supra, discusses the extent of the Secretary's discretion under the Isolated Tracts Act, as amended, 43 U.S.C. § 1171 (1970). See also Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965); George Rodda, Jr., 13 IBLA 114 (1973). The Isolated Tracts Act specifically requires that land be sold for "not less than the appraised value." The Act contains no provision for leasing land. An offer to purchase land under the Isolated Tracts Act is not considered accepted until patent issues. 43 CFR 2711.6. Therefore, although the Secretary has similar discretionary authority under the Isolated Tracts Act and the Small Tract Act, the Government is always in the position of offeree when selling land under 43 U.S.C. § 1171 (1970).

> item 3 [$175.00], plus the cost of survey if necessary to describe the land properly. The application to purchase may be filed not more than 30 days before the expiration of 1 year from the effective date hereof. [Emphasis in original.]

This clause is in accord with 43 CFR 257.13(a) (1954 Supp.) which authorizes the option to purchase at the appraised value of the land as of the date of the lease. 2/

The option to purchase clause has been interpreted as "not a binding term or condition of the lease, but only a bare offer to sell unsupported by consideration." Solicitor's Opinion, M-36315 (March 7, 1956). (Emphasis added.) See Henry Offe, A-29060 (December 10, 1962); Robert J. Moore, A-27599 (July 3, 1958). An option in the form of an offer is subject to acceptance if not withdrawn. If acceptance occurs, a binding contract is created. 77 AM. JUR. 2d Vendor and Purchaser § 34 (1975); 91 C.J.S. Vendor and Purchaser § 13 (1955); see also 49 AM. JUR. 2d Landlord and Tenant § 367 (1970).

The applicability of general contract law when the Government is a party to the contract was explained in Standard Oil of California v. Hickel, 317 F. Supp. 1192 (D. Alas. 1970), aff'd per curiam, Standard Oil of California v. Morton, 450 F.2d 493 (9th Cir. 1971):

> The Government's rights and obligations as lessor of public lands are no different from those of any other lessor. * * * The rules of construction applicable to Government contracts are the same rules applied to contracts between private parties. [Citations omitted.]

Standard Oil of California v. Hickel, supra at 1197. Therefore, by applying the above rule of contract law to appellant's lease, the option to purchase clause, coupled with the Government's offer to sell the tract pursuant to the November 9, 1955, authorization of the Secretary, constituted an offer to sell which would become a binding contract upon acceptance by appellant, i.e., upon proper exercise of the option. Infra.

The improvement requirement was waived by the Department under certain conditions during the mid-1950's. Various Departmental decisions refer to a general waiver authorization, approved

2/ The amended version of this regulation is now codified as 43 CFR 2913.3(a).

by the Assistant Secretary, dated March 26, 1954, revised August 9, 1954, and February 2, 1955. Henry Offe, supra; John A. Hall, A-27555 (May 6, 1958); Albert H. Dobry, 64 I.D. 116 (1957). This waiver authorization allowed the lessees either to purchase under the provisions of their leases (at the stated price and only if the improvements were built), or to purchase at a new appraised value without building any improvements.

In appellant's case, however, the authorization to purchase without improvement pertained only to small tract leases in Clark County, Nevada. On November 9, 1955, the Secretary of the Interior approved a memorandum of the Director, Bureau of Land Management, dated October 19, 1955, to solve special small tract program problems in that county. It authorized the sale "at the appraised price shown in their leases * * *, the tracts held by existing lessees * * *." The memorandum explained the need for Secretarial authorization and the reason for allowing purchase without improvement construction, partly as follows:

> Clark County has a zoning ordnance [sic] and building codes by which it can control land improvement in the county. The Home-Siters group is also working on machinery for control of construction. Federal control, therefore, is not necessary. This part of the plans cannot be done under the present regulations but your approval of this memorandum will constitute our authority to take this step. Approval of this procedure will so reduce the requirements for field examination and adjudication that it will permit relatively early solutions of the whole Las Vegas problem.

The notice sent to appellant referred to this authorization for "the acceptance of applications to purchase lands held under small tract leases in the Las Vegas, Nevada, area without the necessity of compliance with the improvement requirements specified in the lease." It required an application fee of $10 and the purchase price specified in the lease to be filed by October 13, 1956.

We are unaware of any Departmental decision or Solicitor's memorandum which pertains to the exercise of the option under this special authority for Clark County, Nevada, during the time in question here. The cases cited above apply other authorizations which set forth different conditions than those pertaining solely

to Clark County at that time. Therefore, this is a case of first impression. If appellant had met the improvement requirements within the time required there is no question he would have established a right to purchase at the lease price. If the modification in the option to purchase had required a reappraised purchase price, payment of the reappraised price would have been necessary to meet the alternative offer afforded by the Department. Here, however, the Department sought to alleviate its administrative problems peculiar to Clark County by changing the terms of the option to permit the lessee to purchase at the original appraised lease price without the necessity of improvement construction, but within a definite time period. This authorization and notice to appellant was a modification of the offer of sale to the lessee. Although this modification benefited the lessee, nevertheless, it constituted an offer to sell. Indeed, the November 9, 1955, authorization of the Secretary recites that BLM is to:

> Offer to sell at the appraised price shown in their leases * * * the tracts held by existing lessees * * *.

By filing his purchase application supported by consideration of $175, appellant accepted the Government's offer to sell and established a binding contract by obligating himself to purchase the land on the terms proposed by the Government. Cf. Henry Offe, supra. The Department's policy that full value must be received in all land transactions only applies in the absence of a binding contract. 602 DM 3.1. Although administrative delay cannot create rights in an applicant, Eugene G. Roguszka, supra, neither can such delay take away rights already created. Where issuance of the patent under the Small Tract Act was delayed for years because of the contest of a conflicting mining claim, a reappraisal to determine changed value since that time is not required where there was such a binding contract under special authority.

On remand, the Nevada State Office may inquire into appellant's compliance with the terms of the option. If appellant properly exercised his option, the value of the land may not now be reappraised. Appellant's purchase price must then remain as set forth in his lease. 43 CFR 2913.3(a). 3/

3/ There is nothing in the case record which would suggest that the original appraisal was incorrect. Our decision is premised upon an assumption that the appraisal was correct. If further information should disclose this assumption is not correct, a result different from that reached in this decision might be necessitated. See Solicitor's Opinion, M-36315 (March 7, 1956).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded for further action consistent with this opinion.

Joan B. Thompson
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge